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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ANGEL RAMIREZ,

Defendant and Appellant.

D053015

(Super. Ct. No. SCS207320)

In re JOSE ANGEL RAMIREZ on Habeas
Corpus.

D054793

CONSOLIDATED APPEAL and petition for writ of habeas corpus following a judgment of the Superior Court of San Diego County, Esteban Hernandez and William H. McAdam, Jr., Judges. Judgment affirmed, petition denied.

Defendant Jose Angel Ramirez pleaded guilty to one count of vehicular manslaughter (count 2: Pen. Code,¹ § 192, subd. (c)(1)) and admitted the truth of an

¹ All further statutory references are to the Penal Code.

allegation that he personally inflicted great bodily injury on the victim (§ 1192.7, subd. (c)(8)). In executing his change of plea form, Ramirez initialed a "*Blakely* Waiver."² During sentencing, the court found that (1) when Ramirez's car hit the victim's motorcycle, Ramirez was driving at an unsafe speed, and he was distracted in that he was being pursued by Border Patrol agents; and (2) the victim was "particularly vulnerable." Based on these findings, the court sentenced Ramirez to the upper term of six years.

Ramirez appeals the sentence, contending (1) the court violated the holding in *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856] (*Cunningham*) by considering facts not found by a jury; or, alternatively, he was denied the effective assistance of counsel guaranteed by the Sixth Amendment because his defense counsel failed to make a *Cunningham* objection to the imposition of the upper term; and (2) the case must be remanded for a new sentencing hearing because (a) the court abused its discretion by concluding the aggravating factors outweighed the mitigating factors, (b) the aggravating factors found by the court were not supported by the evidence, and (c) the court improperly considered Ramirez's speed as an aggravating circumstance because it was an element of the vehicular manslaughter offense; or, alternatively, defense counsel rendered ineffective assistance by failing to object to the court's use of improper factors in aggravation to impose the upper term.

² In *Blakely v. Washington* (2004) 542 U.S. 296, 301, 303-304 [124 S.Ct. 2531] (*Blakely*), the United States Supreme Court held that a Washington State trial court violated a criminal defendant's Sixth Amendment right to a jury trial by imposing "an exceptional sentence" beyond the "standard range" under Washington's sentencing reform act, based upon facts neither proved to a jury beyond a reasonable doubt, nor admitted by the defendant.

In his petition for writ of habeas corpus,³ Ramirez contends his imprisonment is unlawful because he was denied his Sixth Amendment right to the effective assistance of counsel when his defense counsel (1) advised him to execute the *Blakely* waiver in his guilty plea form, and (2) stipulated to the preliminary hearing transcript as the factual basis for the guilty plea.

We will reject Ramirez's contentions on appeal and affirm the judgment because he waived his right under *Blakely* to a jury trial as to any aggravating facts, the court's findings are supported by the evidence, the court properly considered Ramirez's speed as an aggravating circumstance, and the court did not abuse its discretion in finding the aggravating factors outweighed the mitigating factors. For reasons we shall explain, we will also deny Ramirez's petition for writ of habeas corpus.

FACTUAL BACKGROUND⁴

Late in the morning on December 21, 2006, as Ramirez was driving westbound on Otay Lakes Road, two Border Patrol agents attempted to initiate a lawful traffic stop by turning on the overhead lights on their vehicle and intermittently engaging the siren. Ramirez sped away, accelerating to between 65 and 75 miles per hour on a straight stretch of the road after passing another car. The Border Patrol agents ended the chase

³ By order dated March 25, 2009, this court ordered that Ramirez's habeas corpus petition (D054793) be considered concurrently with his appeal (D053015). For purposes of disposition, these cases are consolidated by separate order of July 28, 2009.

⁴ Because the parties stipulated that the evidence presented at the preliminary hearing would provide the factual basis for Ramirez's guilty plea, we take the statement of facts from the transcript of that hearing.

because it had become a high-risk pursuit given Ramirez's excessive speed, the narrowness of the road, and the curves in the road.

The agents, who lost sight of Ramirez as he rounded a curve in the road, saw a cloud of dust less than 30 seconds after they ended the pursuit. Ramirez lost control of his car, hit piles of dirt on the side of the road, entered the lane of oncoming traffic, and killed Robert Gregorio, who was riding his motorcycle in that lane.

Two accident reconstruction experts concluded Ramirez was driving between 58 and 63 miles per hour when he rounded the curve. The speed limit on Otay Lakes Road is whatever is safe for the condition of the road, not to exceed 55 miles per hour. Both experts opined the accident was caused by Ramirez's aggressive steering maneuvers and excessive speed, which caused his car to spin, hit the dirt, cross the double-yellow lines, and enter the oncoming lane in which the victim was riding his motorcycle.

DISCUSSION

I. *APPEAL*

A. *Cunningham/Blakely*

Ramirez first contends the court violated his Sixth Amendment right to a jury trial and the holding in *Cunningham*, *supra*, 549 U.S. 270, by sentencing him based on facts not found by a jury. Alternatively, he claims he was denied the effective assistance of counsel guaranteed by the Sixth Amendment because his defense counsel failed to make a *Cunningham* objection to the imposition of the upper term. These contentions are unavailing because, as we shall explain, Ramirez executed a *Blakely* waiver when he pleaded guilty.

1. *Background*

In sentencing Ramirez to the upper term of six years, the court made the following findings:

"[F]irst, [Ramirez] was driving at an unsafe speed and was distracted in that he was being pursued by Border Patrol [agents]; secondly, the victim was particularly vulnerable. The court finds these two factors outweigh quantitatively all of the factors in [mitigation] that's been put forward by the defense."

2. *Applicable legal principles*

In *Cunningham, supra*, 549 U.S. at pages 292-293, the United States Supreme Court held that California's determinate sentencing law (DSL) violated a defendant's federal constitutional right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution by allocating to the trial judge, rather than to the jury, the authority to find the facts that render a defendant eligible for an upper term sentence. (See also *People v. Sandoval* (2007) 41 Cal.4th 825, 831-832 (*Sandoval*).) The *Cunningham* court reaffirmed its prior holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Cunningham, supra*, 549 U.S. at p. 291, fn. 14.)

In the wake of *Cunningham*, the California Legislature amended the DSL, effective March 30, 2007, so as to comply with that decision. (Stats. 2007, ch. 3, § 2, enacting Sen. Bill No. 40 (2007-2008 Reg. Sess.); *Sandoval, supra*, 41 Cal.4th at pp. 843-845; see also amend. history and Historical and Statutory Notes, 50C West's Ann. Pen.

Code (2009 supp.), foll. § 1170, pp. 14-16.) As pertinent to this appeal, the Legislature amended former section 1170, subdivision (b) to make the middle term a discretionary rather than presumptive term. (Stats. 2007, ch. 3, § 2; see *Sandoval*, *supra*, 41 Cal.4th at pp. 845-847.) As amended, that subdivision provides:

"When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall set forth on the record the reasons for imposing the term selected"

3. *Analysis*

When Ramirez entered his guilty plea, he signed and initialed a change of plea form that included the following *Blakely*⁵ waiver provision:

"(***Blakely Waiver***) Except where a prison term has been set by stipulation of the parties, *I agree that the sentencing judge may determine the existence or non-existence of any aggravating facts which may be used to increase my sentence on any count or allegation above the middle term*, either at the initial sentencing or at any future sentencing in the event my probation is revoked."
(Original boldface, italics added.)

Ramirez does not challenge his guilty plea, which includes the agreement set forth in the *Blakely* waiver provision of his change of plea form. Therefore, we may consider that waiver provision in our analysis of his contentions.

We conclude that by signing his change of plea form and initialing the *Blakely* waiver provision, Ramirez explicitly waived his right under *Blakely* to a jury trial with respect to any aggravating circumstances. Ramirez's reliance on *People v. French* (2008)

⁵ See footnote 2, *ante*.

43 Cal.4th 36 is misplaced, as that case did not involve an explicit, written *Blakely* waiver. At the hearing at which he pleaded no contest to various counts, the *French* defendant orally waived his right to a jury trial on the substantive offenses, and he did not request a jury trial on the aggravating circumstances. (*French, supra*, 43 Cal.4th at pp. 42, 48.) Holding that the defendant did not forfeit his Sixth Amendment right by failing to request a jury trial on the aggravating circumstances, the California Supreme Court commented in a footnote that "[a]ny potential constitutional error arising out of the application of *Blakely* to the California sentencing scheme could have been eliminated had the People sought and obtained an explicit waiver of defendant's right to jury trial on aggravating circumstances or an admission of aggravating facts." (*French, supra*, at p. 48, fn. 6.) Here, as already noted, the prosecution obtained from Ramirez an explicit waiver of that right. Because we have concluded that Ramirez explicitly waived his right under *Blakely* to a jury trial with respect to any aggravating circumstances, we need not address either his alternative contention that he was denied effective assistance of counsel or the People's contention that he failed to obtain a certificate of probable cause.

a. *Sandoval*

In his appellant's reply brief, Ramirez claims for the first time that the court's imposition of the upper term was unlawful because the incident at issue in this case occurred on December 21, 2006, *before* the California Legislature amended the DSL effective March 30, 2007, in response to *Cunningham*. Conceding that this court is bound by the California Supreme Court's decision in *Sandoval, supra*, 41 Cal.4th 825, Ramirez contends *Sandoval* was incorrectly decided and cannot be reconciled with

Cunningham, supra, 549 U.S. 270. Specifically, he contends the California Supreme Court in *Sandoval* "in effect rewrote the DSL" in a manner that violated the ex post facto clause, federal due process, and the doctrine of separation of powers. These contentions are unavailing.

Because Ramirez belatedly raised the foregoing contentions for the first time in his reply brief, we conclude he has forfeited them for purposes of this appeal. "Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453; see also *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11 ["Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant."]; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 ["We refuse to consider the new issues raised by defendant in his reply brief."].)

Even if Ramirez had not forfeited these contentions, we would conclude they are unavailing. This court is bound by the California Supreme Court's holding and rationale in *Sandoval*. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.)

B. Abuse of Discretion Claim

Ramirez also contends his upper term sentence must be reversed, and the case must be remanded for a new sentencing hearing because (1) the court abused its discretion by concluding the aggravating factors outweighed the mitigating factors, (2) the aggravating factors found by the court were not supported by the evidence, and (3)

the court improperly considered Ramirez's speed as an aggravating circumstance because it was an element of the vehicular manslaughter offense. Alternatively, Ramirez claims his trial counsel rendered ineffective assistance by failing to object to the court's use of improper factors in aggravation to impose the upper term. These contentions are unavailing.

1. *Standard of Review*

A trial court's decision to impose an upper term sentence is reviewed for an abuse of discretion. (*Sandoval, supra*, 41 Cal.4th at p. 847; *People v. Castellano* (1983) 140 Cal.App.3d 608, 614-615.) "The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' [Citation.]" (*Sandoval, supra*, at p. 847.) "[A] trial court will abuse its discretion . . . if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision. [Citations.]" (*Ibid.*) A sentencing court has wide discretion in weighing aggravating and mitigating factors and may balance them against each other in both qualitative and quantitative terms. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.)

2. *Analysis*

a. *Forfeiture*

Although the People contend Ramirez forfeited his asserted claims of sentencing error by failing to object to the two aggravating factors on which the court relied in imposing the upper term sentence, we assume, without deciding, that Ramirez did not

forfeit his claims.⁶ Based on this assumption, we need not, and shall not, address his alternative contention that his trial counsel rendered ineffective assistance of counsel by failing to object to the court's use of what Ramirez characterizes as improper factors in aggravation to impose the upper term.

b. *Merits*

We reject Ramirez's contentions that the court abused its discretion by concluding the aggravating factors outweighed the mitigating factors, and that the aggravating factors found by the court were not supported by the evidence. In his statement in mitigation, and during the sentencing hearing, Ramirez urged the court to grant probation or, alternatively, impose the lower prison term. The defense argued that although Ramirez was speeding at the time of the collision, and he was in the United States illegally and driving without a license, he could not avoid the accident because his car hit a pile of dirt left by the County of San Diego on the side of the road that redirected his car onto the oncoming lane, he tried to avoid the motorcycle, he admitted fault, he had no prior criminal record, no drugs or alcohol were in his system at the time of the collision, and he pleaded guilty to vehicular manslaughter. As already discussed, the court imposed the

⁶ It is well established that even when a party has forfeited a right to appellate review by failing to preserve a claim in the trial court, an appellate court may still review the claim as an exercise of its discretion. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6; *People v. Johnson* (2004) 119 Cal.App.4th 976, 984 ["The fact that a party, by failing to raise an issue below, may forfeit the right to raise the issue on appeal does not mean that an appellate court is precluded from considering the issue." (Italics omitted.)].) This is especially true in the criminal law context where forfeiture may lead to a subsequent filing of a petition for a writ of habeas corpus asserting ineffective assistance of counsel based on trial counsel's failure to preserve the issue. (*People v. Crittenden* (1994) 9 Cal.4th 83, 160, fn. 18.)

six-year upper term, finding that when Ramirez crossed the double-yellow line on Otay Lakes Road and collided with the victim's motorcycle, he was driving at an unsafe speed, he was distracted in that he was being pursued by Border Patrol agents, and the victim was particularly vulnerable. The court also found these factors outweighed all of the factors in mitigation presented by the defense.

Substantial evidence supports the court's factual findings that Ramirez was driving at an unsafe speed and was distracted in that he was being pursued by Border Patrol agents. The evidence presented at the preliminary hearing, which the defense stipulated would provide the factual basis for Ramirez's guilty plea, shows that when the Border Patrol agents tried to lawfully pull Ramirez over, he sped away at an unsafe speed and attempted to flee on narrow, winding Otay Lakes Road. Given the conditions of the road, Ramirez's speed was so excessive that the Border Patrol agents had to end the chase because it had become a high-risk pursuit. Two accident reconstruction experts opined the collision was caused by Ramirez's excessive speed and aggressive steering maneuvers, which caused his car to spin, hit the dirt, cross the double-yellow lines, and enter the oncoming lane in which the victim was riding his motorcycle. One of the experts, who interviewed the Border Patrol agents who tried to pull Ramirez over, opined that the pursuit was a factor with respect to why Ramirez was speeding and why he came into the turn as late as he did. We conclude the foregoing evidence is sufficient to support the court's findings that Ramirez was driving at an unsafe speed and was distracted in that the Border Patrol agents pursued him after he refused to pull over.

Even though defense counsel acknowledged at the sentencing hearing that "[t]here was simply no time to avoid this accident" once Ramirez entered the motorcyclist victim's lane, we need not reach the issue of whether the evidence is sufficient to support the court's finding that the victim was particularly vulnerable within the meaning of California Rules of Court,⁷ rule 4.421(a)(3). A single factor in aggravation is sufficient to support the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) Here, Ramirez's intentional acts of fleeing from the Border Patrol agents and driving while distracted on a narrow and winding country road are aggravating factors under rule 4.408(a)⁸ that fully justify the upper term sentence imposed by the court, whose decision, which was neither arbitrary nor capricious, was based on relevant circumstances. We thus also conclude the court did not abuse its discretion in finding that the aggravating factors outweighed the mitigating factors.

Although the court could have treated as additional aggravating factors under rule 4.408(a) (as the probation officer recommended in her report) the undisputed facts that Ramirez was in the United States illegally, and he was driving without a valid driver's license and insurance, when he lost control of his car and killed the victim, we note that the court did not make such findings on the record.

⁷ All further rule references are to the California Rules of Court.

⁸ Rule 4.408(a) provides: "The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria must be stated on the record by the sentencing judge."

We reject Ramirez's contention that it was improper for the court to consider speeding as an aggravating factor because (he asserts) speeding was an element of vehicular manslaughter. A circumstance that is an element of the substantive offense cannot be used as an aggravating factor. (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1261-1262; *People v. Wilks* (1978) 21 Cal.3d 460, 470.) "A sentencing factor is only an element of the offense . . . if the crime as defined by statute cannot be accomplished without performance of the acts which constitute such factor." (*People v. Burbine, supra*, 106 Cal.App.4th at p. 1262.) Here, Ramirez pleaded guilty to vehicular manslaughter in violation of section 192, subdivision (c)(1), which provides:

"Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: [¶] . . . [¶] (c) Vehicular-- [¶] (1) Except as provided in subdivision (a) of Section 191.5, driving a vehicle in the commission of an unlawful act, not amounting to felony, and with gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence."

Section 192, subdivision (c)(1), does not provide that speeding is an element of vehicular manslaughter. Thus, the court properly considered Ramirez's act of speeding as an aggravating circumstance. Even if speeding were an element of that offense, the court also found as a separate aggravating factor that Ramirez was distracted as he was speeding because he was fleeing from Border Patrol agents. This aggravating circumstance of driving in a distracted state while fleeing from Border Patrol agents who had attempted to lawfully execute a traffic stop was sufficient to justify imposition of the upper term sentence in this case. (See *People v. Osband, supra*, 13 Cal.4th at p. 728.)

We reject as unsupported by the evidence Ramirez's assertion in his reply brief that "[his] case was a routine . . . vehicular accident accompanied by ordinary negligence."

II. *HABEAS CORPUS PETITION*

A. *Ineffective Assistance of Counsel: Blakely Waiver*

In his petition, Ramirez first contends his imprisonment is unlawful because he was denied his Sixth Amendment right to the effective assistance of counsel when his defense counsel advised him to execute the *Blakely* waiver in his guilty plea form. We reject this contention.

1. *Applicable Legal Principles*

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) The right to counsel "entitles the defendant not to some bare assistance but rather to effective assistance." (*Ibid.*, italics omitted.) A defendant claiming ineffective assistance of counsel has the burden to show: (1) Counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *Ledesma, supra*, at pp. 216, 218.) Prejudice is shown when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra*, 466 U.S. at p. 694.)

2. *Analysis*

A criminal defendant may "consent to judicial factfinding." (*Blakely, supra*, 542 U.S. at p. 310.) Here, Ramirez initialed the *Blakely* waiver provision of his guilty plea form, which (as already noted) provided in part:

"I agree that the sentencing judge may determine the existence or non-existence of any aggravating facts which may be used to increase my sentence on any count or allegation above the middle term . . . at the initial sentencing."

Ramirez first contends his trial counsel, Gayle Thorne, gave ineffective assistance by advising him to sign the *Blakely* waiver as part of his plea agreement because without the waiver he was subject to a two- or four-year sentence, and by executing the waiver he exposed himself to the upper term sentence of six years without receiving any benefit in exchange for that waiver. We reject this contention because his signing of the *Blakely* waiver did not expose him to any greater sentence than he could have received had he not signed the waiver. The possible sentences for gross vehicular manslaughter—the offense to which he pleaded guilty—were two, four, or six years, regardless of whether Ramirez signed the *Blakely* waiver. (§§ 192, subd. (c)(1), 193, subd. (c)(1).) By signing that waiver, Ramirez simply agreed that the court, rather than a jury, could determine the existence or nonexistence of the relevant sentencing factors.

Ramirez also contends his counsel did not adequately explain the *Blakely* waiver to him because she should have explained that his maximum potential sentence would increase by two years if he executed the *Blakely* waiver. In his supporting declaration, which is attached to his petition as exhibit No. F, Ramirez states he would not have

agreed to the *Blakely* waiver if his trial attorney had explained to him what it was because "it was not necessary to [his] guilty plea and it increased [his] potential sentence." We reject Ramirez's contention because in her own declaration, a copy of which is attached to the petition as exhibit No. G, Thorne states she used a translator to explain the *Blakely* waiver to Ramirez, and she told him that the sentencing range in this case "2-4-6," the *Blakely* waiver "allows *judges* the discretion to impose the Rules of Court," and "the California Rules of Court allow *the court* [to] balance aggravating and mitigat[ing] factors." (Italics added.) We conclude that Ramirez has failed to meet his burden of showing that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Because we have concluded Ramirez has failed to establish that Thorne's performance was deficient, we need not, and do not, address the issue of whether her alleged deficient performance resulted in prejudice.

B. Ineffective Assistance of Counsel: Preliminary Hearing Transcript

Ramirez also contends that his imprisonment is unlawful because he was denied his constitutional right to the effective assistance of counsel when his defense counsel stipulated to the preliminary hearing transcript as the factual basis for the guilty plea. Specifically, he contends that "[a] reasonably competent attorney would have stipulated to an abbreviated statement of the facts—something along the lines of, '[Ramirez] lost control of his vehicle, causing Mr. Gregorio's death.'" "Such a stipulation," he asserts, "would have been sufficient to satisfy the factual basis of the plea without unnecessarily

providing facts . . . the trial court could use to elevate [his] sentence to the upper term."

We reject this contention.

When an ineffective assistance claim can be resolved solely on the basis of lack of prejudice, it is unnecessary to determine whether counsel's performance was objectively deficient. (*In re Jackson* (1992) 3 Cal.4th 578, 604, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6.)

Here, Ramirez has failed to show he was prejudiced by his trial counsel's stipulation. First, in determining the sentence, the court could have considered the testimony presented at the preliminary hearing in the absence of counsel's stipulation that this testimony could serve as the factual basis for Ramirez's guilty plea. (§ 1170, subd. (b) ["In determining whether there are circumstances that justify imposition of the upper . . . term, the court may consider the record in the case."]; rule 4.420(b) ["the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision," and "[t]he relevant circumstances may be obtained from the case record"].)

Second, the court could have found the aggravating circumstances without considering the preliminary hearing transcript. The court stated it was imposing the six-year upper term because Ramirez "was driving at an unsafe speed and was distracted in that he was being pursued by Border Patrol" and because "the victim was particularly vulnerable." At the hearing on Ramirez's guilty plea, both Ramirez's counsel and Ramirez himself agreed that the following facts, recited by the prosecutor, would provide a factual basis for his plea:

"[Ramirez] was being stopped in a lawful manner by the Border Patrol. They activated lights. [Ramirez] failed to yield and sped away. He exceeded the speed limit in going into a curb, crossed the yellow line, lost control of the vehicle, hit berms on one side, bounced back, and went into an oncoming lane where he struck and killed a motorcyclist who was in his lane. The speed . . . was excessive. The speed limit was 55. [Ramirez's] speeds appeared to be greater than 55, and he did cross the double yellow line."

Although Ramirez indicates in his petition that his counsel could have stipulated to a briefer statement of the facts in lieu of stipulating to the use of the preliminary hearing transcript as the factual basis for the guilty plea, he does not claim his counsel provided ineffective assistance by stipulating to the facts recited by the prosecutor. Furthermore, Ramirez suggested "abbreviated" stipulation of the facts—that he "lost control of his vehicle, causing Mr. Gregorio's death"—would not have accurately presented the pertinent facts and would not have established the elements of gross vehicular manslaughter. For all of the foregoing reasons, Ramirez's petition is denied.

DISPOSITION

The judgment is affirmed; the petition is denied.

NARES, Acting P. J.

WE CONCUR:

McDONALD, J.

AARON, J.